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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

PETTERSON LIGHTERAGE & TOWING CORPORATION, AND CONNERS MARINE CO., INC., AS OWNER OF SCOW "EVERETT FOWLER"

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on November 5, 1945.

### OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 103–107) is reported at 60 F. Supp. 960. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 118–119) is not yet reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 5, 1945 (R. 120). On

February 4, 1946, the time within which to file a petition for a writ of certiorari was extended by order of Mr. Justice Reed to and including March 6, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED.

1. Whether the Tucker Act authorizes a Federal district court to implead the United States as a third party defendant in admiralty.

2. Whether a claim against the United States, as consignee of goods delivered by vessel, for failure to provide a safe berth for the vessel, is a claim founded upon contract or is a claim for damages "sounding in tort" within the meaning of the Tucker Act.

## STATUTES INVOLVED

The relevant portions of the Tucker Act are set forth in the Appendix, *infra*, p. 15.

## STATEMENT

Respondent, Conners Marine Co., Inc. ("libelant") filed a libel in admiralty in the United States District Court for the Southern District of New York, to recover $3,700 for damages sustained by its scow, the ***Everett Fowler,*** while under charter to respondent, Petterson Lighterage & Towing Corporation (the "charterer") (R. 3–4). The charterer filed its answer, conceding damage to the scow, but alleging that the damage was

caused by pounding from an Army stake boat, and was due to the fault of the scow captain supplied by the libelant, and to the negligence of Army representatives in charge of the stake boat (R. 5–9). The charterer filed with its answer a petition to implead the United States, the petition invoking alternatively the Suits in Admiralty Act and the Public Vessels Act, and making allegations similar to those in the answer (R. 10–14). The United States, in answer to the petition, admitted that the stake boat was a "public vessel" of the United States, but denied that the stake boat had caused the damage or that the United States was in any way at fault (R. 15–17).

The evidence adduced before the District Judge revealed the following facts: The charterer, by oral contract with the United States Army Transportation Corps, agreed to transport goods by water to the Brooklyn Army Base (R. 36–37, 50, 52). Upon receipt of orders from the Army, the charterer would supply boats for loading at a time and place designated by the Army, and after the boats were loaded, would tow them to the particular destination requested (R. 37). Where lighters towed to the Army Base were moored to the stake boat, the Army would then tow the lighters from the stake boat to the piers at the Army Base (R. 41, 60, 76). Arrival of a lighter at the Army Base was customarily reported by the scow captain to the Army Base or the charterer;

and the scow captain or the Army reported to the charterer when the lighter was light (R. 41).

The scow, *Everett Fowler,* was chartered from libelant by oral bare-boat charter, the scow captain being furnished and paid by libelant (R. 36, 47). In March 1943, upon oral orders from the Army, the charterer made the *Everett Fowler* and two other scows available at Greenville, New Jersey, for the loading of drums of Army owned gasoline to be transported to Piers 2 and 3 of the Brooklyn Army Base (R. 38, 50–51, 57). On April 4, 1943, the charterer's tug, *Bon,* towed the scows from Greenville to the Army Base (R. 51). Upon approaching the Base, an Army patrol boat directed the tug to moor the scows to an Army stake boat anchored approximately one-quarter mile from the piers (R. 57, 58, 62, 63). Deck hands from the tug tied up the scows (R. 59, 62), but the record fails to disclose whether the scows were secured directly to the stake boat or to other barges tied up at the stake boat (R. 58, 59, 61, 63, 67–68). The scow captain was not then aboard the *Everett Fowler,* having gone ashore at some earlier time (R. 59, 61).

On April 5, 1943, while the *Everett Fowler* was still secured, heavy weather arose, causing the scow to pound and ultimately suffer the damage in question (R. 51, 53, 54, 55). The scow captain advised the charterer by telephone that the scow

was pounding and should be shifted (R. 42, 51).[1] The charterer, in turn, so advised the office of the Army tug dispatcher by telephone, and was told it would be taken care of (R. 43, 51, 53). The charterer took no further steps to ascertain whether anything was done to protect the scow (R. 54).

On the foregoing evidence, the district court judge entered findings of fact and conclusions of law, holding that the charterer was negligent and liable for the damage to the scow (R. 106). The court, however, dismissed the petition against the United States, on the ground that the record failed to show that the Army stake boat had physically caused the damage, or that the Government had "in fact or even impliedly" assumed "responsibility for the safekeeping of the scow" (R. 105, 106). On appeal, the court below affirmed as to the charterer but reversed as to the United States (R. 118–120). While agreeing that the Public Vessels Act was inapplicable, since the damage was not shown to have been caused by the stake boat, the court below found "jurisdiction" over the "charterer's petition" in the Tucker Act "for breach by the United States, as consignee, of its contractual obligation to the charterer," and concluded that "the United States, because of its

[1] The scow captain did not appear as a witness and accordingly his testimony as to what transpired either at the stake boat or elsewhere is not available.

obligations to Petterson, is primarily liable, and Petterson secondarily" (R. 119).

### SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Second Circuit erred:

1. In holding that the instant action could be converted into a Tucker Act suit in the appellate court.

2. In holding that the Tucker Act permitted the impleading of the United States and the assertion by libelant of the charterer's claim against the United States.

3. In holding that the United States was under a contractual obligation to the charterer to provide a safe berth for the *Everett Fowler*.

4. In holding that the United States negligently failed to provide a safe berth for the *Everett Fowler*.

5. In failing to hold that the charterer's claim against the United States was a claim for damages "sounding in tort" within the meaning of the Tucker Act.

6. In failing to remand the case to the District Court for appropriate findings of fact, as required by Section 7 of the Tucker Act.

7. In reversing the judgment of the District Court with respect to the United States, and holding the United States primarily liable to libelant.

REASONS FOR GRANTING THE WRIT

The instant suit commenced as an ordinary suit in admiralty by libelant against the charterer for damage to a "demised" scow. The charterer's petition to implead the United States asserted a claim under the Public Vessels Act for negligence on the part of the representatives of the United States Army in failing to care for the scow (R. 12–13).[2] The claim against the United States was tried and decided in the District Court and briefed and argued on appeal on this theory. The court below, while agreeing that the charterer had not made out a case under the Public Vessels Act, held that the case could be treated as a Tucker Act suit and concluded that the United States was liable thereunder. In this aspect, the decision of the court below is clearly erroneous, for (1) it is squarely in conflict with the decision of this Court in *United States* v. *Sherwood,* 312 U. S. 584, and (2) countenances a suit against the United States "sounding in tort" to which the United States has not consented.

1. In the *Sherwood* case, this Court held that a district court's jurisdiction under the Tucker Act "does not extend to any suit which could not be maintained in the Court of Claims" (312 U. S.

[2] While the charterer's petition invoked, alternatively, the Suits in Admiralty Act and the Public Vessels Act (R. 13), the United States in its answer conceded that the Army stake boat was a public vessel and the trial proceeded on that theory.

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at 591). The controversy there involved an attempt of a judgment creditor, by a Tucker Act suit against the United States and the judgment debtor, to recover upon the judgment debtor's claim against the United States for breach of contract. Observing that the Court of Claims "is without jurisdiction of any suit brought against private parties" and that adjudication of the judgment creditor's right to assert the claim of the judgment debtor was "prerequisite to any recovery upon the Government contract," this Court held that the suit was not within the jurisdiction of the Court of Claims, and therefore could not be maintained in the district court (312 U. S. at 588).

The decision of the court below is in direct conflict with this holding, for it permits a suit under the Tucker Act which could not be brought in the Court of Claims.[3] If the libel against the charterer were filed in the Court of Claims, it would be dismissed as a suit between private parties. Similarly, if libelant sought to join the United States and the charterer as defendants in a Court of Claims action, the suit as to the charterer would "be ignored as beyond the jurisdiction of the court." *United States* v. *Sherwood*, 312 U. S. 584, 588; *United States* v. *Jones*, 131 U. S. 1; *Lynn*

[3] In neither of the courts below was the *Sherwood* case mentioned by court or counsel. The point, of course, was not relevant on the theory on which the case was tried and argued.

v. *United States,* 110 F. 2d 586, 588 (C. C. A. 5); *Leather & Leigh* v. *United States,* 61 C. Cls. 388, certiorari denied, 271 U. S. 660; *Lowe* v. *United States,* 37 F. Supp. 817 (D. N. J.). While the United States would remain as a proper party defendant, the court would lack jurisdiction over the subject matter, for libelant has no contract claim of its own against the United States (cf. *Evans* v. *United States,* 42 C. Cls. 287), and any claim "sounding in tort" would be outside the court's jurisdiction. 28 U. S. C. 250; Appendix, *infra,* p. 15.

The court below held the United States liable to libelant, not upon any right which libelant had directly against the United States, but upon what the court believed to be the charterer's contractual right that the United States provide a safe berth for the scow (R. 119). But, the charterer's right to a safe berth was not contractual (see *infra,* pp. 10–13). However, assuming that it was, a prerequisite to allowing the libelant to assert it was the adjudication of libelant's claim against the charterer, a claim between private parties. The United States has not "given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated," and the action of the court below, in adjudicating such questions in a Tucker Act suit was clearly erroneous. *United States* v. *Sherwood, supra,* at 589; *Lynn* v. *United States,* 110 F. 2d 586 (C. C. A. 5); *Lowe* v. *United States,* 37 F. Supp. 817

(D. N. J.). Compare *Moreno* v. *United States*, 120 F. 2d 128, 130 (C. C. A. 1); *United States* v. *Dry Dock Savings Institution*, 149 F. 2d 917 (C. C. A. 2).[4]

2. The *Sherwood* doctrine aside, the decision below disregards the basic fact that under the Tucker Act the United States has not consented to be sued in tort.[5] The court below relied exclusively upon that clause of the Tucker Act, *infra*, p. 15, conferring jurisdiction over "claims * * * founded * * * upon any contract, express or implied", and held the United States liable for "breach by the United States, as consignee, of its contractual obligation to the charterer" to provide a safe berth for the scow (R. 119). We submit that there is no basis for the conclusion that the duty to care for the scow was contractual, nor did the court in its opinion suggest any such basis. In addition, the decision below in this aspect conflicts with that of the Court of Claims in *Pendleton* v. *United States*, 56 C. Cl. 222.

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[4] While *Admiral Oriental Line* v. *United States*, 86 F. 2d 201, 88 F. 2d 26 (C. C. A. 2), supports the decision below, it would appear to have been overruled by the *Sherwood* case.

[5] This rule finds expression in that portion of the Tucker Act conferring jurisdiction over claims "for damages * * * *in cases not sounding in tort*, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." (Appendix, *infra*, p. 15).

Presumably, the court below had in mind a contractual obligation, expressed or implied *in fact*, for it is well settled that there is no jurisdiction under the Tucker Act to enforce contracts implied in law. *Alabama* v. *United States*, 282 U. S. 502; *Tempel* v. *United States*, 284 U. S. 121. The record fails to disclose any evidentiary basis for a finding (even if made) that the United States, by the oral contract of affreightment, in fact expressly or impliedly agreed to care for the scow.[6] In the absence of such agreement, the only obligation of the United States with respect to the scow was that of an ordinary consignee of goods delivered by vessel.[7] Such a consignee must, of course, afford a safe berth for the vessel. *Smith* v. *Burnett*, 173 U. S. 430; *The Eastchester*, 20 F. 2d 357 (C. C. A. 2); *Schoonmaker-Conners Co., Inc.* v. *New York Tidewater Gravel Corp.*, 11 F. 2d 470

[6] A consignee of goods, taking delivery by vessel, may, of course, contract regarding the caliber of berth to be supplied. See: *The Masoot*, 28 F. Supp. 770 (D. N. J.); *The Seguin*, 34 F. 2d 226 (D. Me.); *Dougherty Co.* v. *Bader Coal Co.*, 244 Fed. 267 (D. Mass.).

[7] The situation here involved is entirely different from those cases where the United States actually becomes a bailee for hire under a mutual contract of bailment, and assumes a contractual obligation to care for the property bailed. Cf. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 394; *Gulf Transit Co.* v. *United States*, 43 C. Cls. 183. Here, the charterer's "allegations and proof in respect of the agreement" of affreightment merely "were made by way of inducement to his real grievance, which was the damage to the [*Everett Fowler*] caused by negligence" of the United States. Cf. *Stevens* v. *The White City*, 285 U. S. 195, 200–201.

(C. C. A. 2); *M. & J. Tracy, Inc.* v. *Marks, Lissberger and Son, Inc.*, 283 Fed. 100 (C. C. A. 2); *Conklin* v. *R. P. and J. H. Staats Co.*, 161 Fed. 897 (C. C. A. 3).[8] But a damage suit for failure to do so does not rest upon contract, but is a suit "sounding in tort". *Pendleton* v. *United States*, 56 C. Cls. 222.[9]

This is graphically illustrated here, where the basis for the claim against the United States has all the elements and indicia of an ordinary tort—damage to property arising from the negligence of Government representatives. It was just such liability that the United States sought to avoid by withholding consent to be sued in cases "sounding in tort". The claim in the instant case is in sharp contrast with other types of claims against the United States in admiralty, such as claims for salvage (*United States* v. *Cornell Steamboat Co.*, 202 U. S. 184) or for contribution in general average (*United States* v. *Atlantic Mutual Insurance Co.*, 298 U. S. 483). There liability does not rest

[8] See also *Look* v. *Portsmouth K. & Y. Street Ry.*, 141 Fed. 182 (D. Me.); *Goodwin-Gallagher Sand & Gravel Corp.* v. *Washington Bulkley, Inc.*, 31 F. 2d 112 (E. D. N. Y.), affirmed, 31 F. 2d 115 (C. C. A. 2); *Sterns Lumber Co.* v. *J. H. Rice Co.*, 260 Fed. 434 (D. Me.). Cf. *The James McCue*, 37 F. 2d 934 (S. D. N. Y.); *Philadelphia & R. R. Co.* v. *Walker*, 139 Fed. 855 (D. N. H.).

[9] In *Arundel Sand & Gravel Co.* v. *United States*, 66 C. Cls. 90, where the Government was absolved of negligence in providing a berth for a barge delivering sand, the Government did not challenge, and the court's opinion did not consider, the question of jurisdiction, probably because the record clearly shows that the claim was founded upon contract.

upon fault or negligence of Government officers, but rather upon settled principles of admiralty, allowing compensation for services rendered (in the case of salvage) or requiring the sharing of losses sustained in a common venture at sea (general average). In the instant case, the gravamen of the action is property damage due to alleged negligence of Government representatives, and the adjudication essentially turns upon ordinary tort principles. It is submitted, therefore, that the charterer's claim for damages is one "sounding in tort", beyond the jurisdiction of a district court under the Tucker Act.[10]

3. The questions presented are of substantial importance to the administration of the Tucker Act. If the decision below is allowed to stand, the United States in the innumerable instances in which it is consignee of goods shipped by water, may find itself subject to suit for property damage arising from negligence of its employees. We are advised that in the New York area alone there are approximately one hundred outstanding

[10] Even if a damage suit against a consignee for failure to provide a safe berth does not "sound in tort", within the meaning of the Tucker Act, it may be considered as being based upon an obligation implied in law, and therefore beyond the jurisdiction of a district court. As Justice Holmes noted in *Alabama* v. *United States*, 282 U. S. 502, 507, when referring to claims for "damages in a case not sounding in tort", there are "few cases of this sort that cannot be brought under the head of a contract implied in law; and, [it] is established that such contracts are not within the jurisdiction of the Court of Claims."

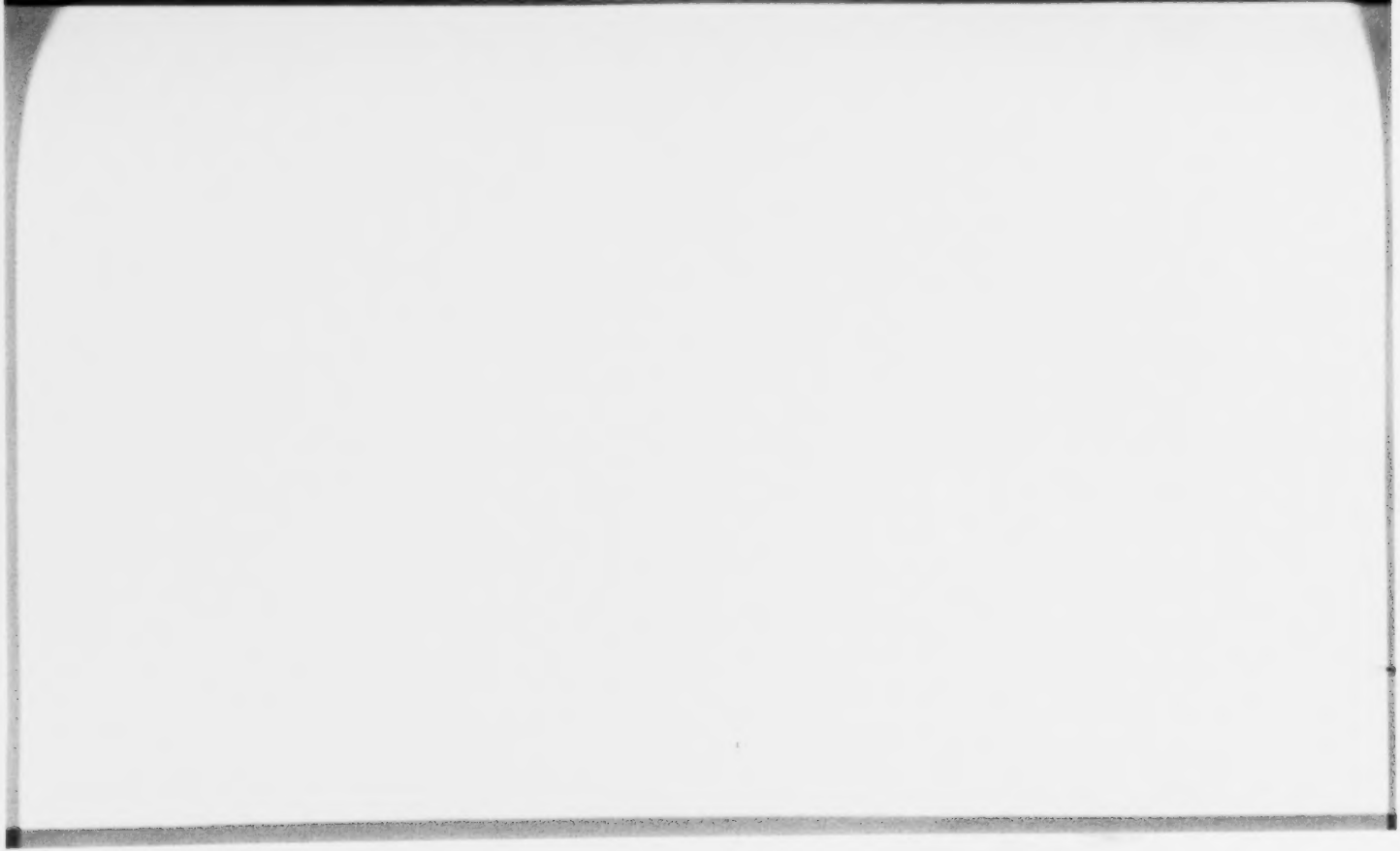
claims against the United States of the character involved in the instant case and heretofore deemed not actionable because "sounding in tort". Unless the decision below is reviewed by this Court, such claims will undoubtedly be made the basis of Tucker Act suits against the United States. Moreover, the district courts, in adjudicating these and other claims against the United States, will in all probability follow the impleader practice permitted by the decision below, in disregard of the *Sherwood* case. This will cause needless and wasteful litigation, should such impleader practice be subsequently disapproved.

### CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
*Solicitor General.*

MARCH 1946.



## APPENDIX

The Tucker Act (28 U. S. C. 41 (20), Act of March 3, 1887, c. 359, Secs. 1, 2, 24 Stat. 505, as amended) provides, in part, that the district courts shall have original jurisdiction as follows:

* * * * *

"(20) SUITS AGAINST THE UNITED STATES. Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *."



U. S. GOVERNMENT PRINTING OFFICE: 1946

FILED

MAR 28 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

October Term, 1945

No. 935

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UNITED STATES OF AMERICA,

*Petitioner,*

*against*

PETTERSON LIGHTERAGE & TOWING CORPORATION, and CONNERS MARINE CO., INC., as Owner of the scow *EVERETT FOWLER*,

*Respondents.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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## BRIEF FOR PETTERSON LIGHTERAGE & TOWING CORPORATION IN OPPOSITION.

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Cornish Press, Inc., 80 Cortlandt St., New York 7, N. Y., U.S.A.

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 915

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UNITED STATES OF AMERICA,

Petitioner,

*against*

PETTERSON LIGHTERAGE & TOWING CORPORATION, and CONNERS MARINE CO. INC., as Owner of the scow *Everett Fowler*,

Respondents.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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## BRIEF FOR PETTERSON LIGHTERAGE & TOWING CORPORATION IN OPPOSITION.

1. The decision of the court below rests upon factual findings that the United States was guilty of a breach of its contractual obligation to this respondent. (R. 119). Those findings appear in the following portions of its opinion:

> "The United States, the consignee, was negligent here in failing to provide a safe berth after receiving notice of the storm and of the resultant danger to the barge * * *. There was no jurisdiction, under the Public Vessels Act, 46 U. S. C. A. 781, to entertain the charterer's petition against the United States, * * * But the Court had jurisdiction of that petition under the Tucker Act, 28 U. S. C. A. §41 (20); for

> an action under that statute may be maintained for the breach by the United States, as consignee, of its contractual obligation to the charterer. It is of no moment that the petition stated that it was 'filed under' the Public Vessels Act. As the petition showed a cause of action, the label should be disregarded." (R. 119).

The findings of the District Court, amplified by its opinion, (R. 103-109), support the findings of the Circuit of Appeals with respect to the petitioner's breach of its contractual obligation. The Circuit Court of Appeals was thereupon justified in disposing of the litigation, without requiring the formality, expense, and delay of a new complaint "labelled" under the Tucker Act, which would merely have led to the same result.

The petitioner confuses the case by discussing it upon matters of form arising from the circumstances that the proceedings were initiated in admiralty in the District Court, where this respondent's petition against the United States was filed under the Public Vessels Act. But, in view of the conclusion of the Circuit Court of Appeals that this respondent's petition had been "labelled" wrongly on the admiralty side of the Court, and that the case should be decided as though this respondent had asserted its cause of action against the United States under the Tucker Act, the main question now raised, is whether the Circuit Court of Appeals erred in finding a breach of petitioner's contractual obligation to this respondent, which would seem to be solely a question of fact.

2. The petitioner entered into a contract with this respondent for the lighterage of petitioner's merchandise in New York Harbor, between berths to be designated by the petitioner, (R. 36-37). Under that contract, the rela-

tionship between the parties was substantially the same as the relationship between an owner of an ocean-going freighter and an owner of cargo, under a voyage charter. It is sound law that when the cargo owner reserves the right to designate and furnish the berths in which the vessel shall load and discharge, it is a term of the contract (implied if not expressed,) that the berths so designated and furnished by the cargo owner will be safe. In the formal printed charter parties or bills of lading of ocean-going carriers that term is usually expressed. *Mencke* v. *Cargo of Sugar*, 187 U. S. 248, 253; *The Antonio Zambrana*, 70 Fed. 320, 323.

Such a contractual obligation of the cargo owner to furnish a safe berth should not be confused with the legal duty of the owner of a wharf to warn an invitee of any hidden danger. The cases cited on pages 11-12 of the petition relating to a wharfinger's duty have no direct bearing upon the cargo owner's contractual obligation under the contract of carriage.

When this respondent furnished the scow *Everett Fowler* to carry a cargo of drums of gasoline (R. 38) under its contract, it stood in the relationship of owner of the scow, so far as the petitioner was concerned, even though the scow had been chartered by this respondent from Conners Marine Co. Inc. (R. 36).

This respondent caused the *Everett Fowler*, with the cargo of gasoline aboard, to be towed to the petitioner's Army Base, Brooklyn, where, on arrival, petitioner's servants and representatives directed that the scow be moored with other boats at the petitioner's stakeboat. (R. 57-58). Admittedly, the stakeboat was owned, operated, and maintained by the petitioner for its own convenience,

anchored some distance off the Army Base piers as a temporary berth for loaded boats until the petitioner was ready to discharge their cargoes, (R. 27). The petitioner also maintained at the Army Base a fleet of its own tugs by which the lighters were moved from the stakeboat to a discharging berth at the Army Base at the petitioner's convenience (R. 40-41; 75).

On the day after arrival at the petitioner's stakeboat the captain of the *Everett Fowler* telephoned to this respondent to report that, in the existing stormy weather, the berth at the stakeboat was unsafe. This respondent immediately telephoned that information to the office of petitioner's despatcher at the Army Base, and was told that the despatcher's office would "take care of it." (R. 42-43). Thereafter, the petitioner failed to remove the scow to a safe berth, and while continuing to lie in the unsafe berth at the stakeboat, she sustained the damages which are the subject matter of this litigation.

The foregoing facts are included in the opinion and findings of the District Court, (R. 103-109) and they support the finding of the Circuit Court of Appeals that the damages were the result of the petitioner's breach of its contractual obligation to this respondent, (R. 119).

3. Although there were two separate causes of action between the three parties to the original proceedings in admiralty, the identical proofs pertained to both actions with respect to the cause and extent of the damage to the scow. Conners Marine Co. Inc., as owner of the *Everett Fowler,* had a cause of action in contract against this respondent as charterer, because of the return of the scow in damaged condition. This respondent, under its contract of carriage, had a cause of action against the petitioner for the same damages to the *Everett Fowler,* resulting from

the petitioner's breach of its contractual obligation to furnish a safe berth.

Conners Marine Co. Inc., having elected to proceed in admiralty, this respondent followed the admiralty practice by asserting its cause of action against the petitioner in a petition of interpleader, thinking that that procedure could be sustained under the Public Vessels Act, 46 U. S. C. A. 781. The Circuit Court of Appeals, having found that jurisdiction could not be invoked under the Public Vessels Act, concluded that this respondent's pleading against the petitioner stated a cause of action under the Tucker Act, 28 U. S. C. § 41(20) on the factual basis that the damage complained of resulted from petitioner's breach of a contractual obligation. There was no inconsistency in the ruling that, as this respondent could not assert against the petitioner a statutory action in tort under the Public Vessels Act, respondent could still assert its cause of action *ex contractu*, under the Tucker Act. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 372.

The situation, then, was that this respondent could have brought a separate action against the petitioner under the Tucker Act which presumably could have been heard by the Court at the same time as the suit of Conners Marine Co. Inc. against this respondent, inasmuch as both causes of action arose out of the same incident, and the identical evidence was pertinent to each with respect to the cause and extent of the damage. Or, a severance of the two causes of action might have been ordered, leaving this respondent's cause of action under the Tucker Act to be heard separately, *Lynn* v. *United States*, 110 F. (2d) 586; *Lowe* v. *United States*, 37 F. Supp. 817. The Circuit Court of Appeals apparently took the view that any such further formalities would waste the time of the courts and of the

litigants, inasmuch as no different result would be reached through further proceedings. It therefore construed the case as though this respondent had sued the petitioner under the Tucker Act; and although the Circuit Court of Appeals followed the form of the admiralty procedure in adjudicating a primary and secondary liability, the result was exactly the same as though there had been two separate actions with an award of damage to Conners Marine Co. Inc., against this respondent, and a further award of the same identical damage to this respondent against the petitioner. In thus eliminating the formality of further proceedings, the Circuit Court of Appeals followed an established practice. *Admiral Oriental Line* v. *United States,* 86 F. (2d) 201, 203; *United States* v. *The John R. Williams,* 144 F. (2d) 451, 454; *Cory Bros.* v. *United States,* 51 F. (2d) 1010, 1013.

4. For the foregoing reasons, this respondent believes that this case does not involve the questions of law, or conflicts between the courts, asserted by the petitioner, and that the various decisions cited in the petition, such as *United States* v. *Sherwood,* 312 U. S. 584, have no application because of the factual background of the case at bar.

5. The petitioner's assertion that there are approximately 100 outstanding claims against the United States in the New York area which may be affected by the decision in this case does not lend importance to the present matter. The facts which may be involved in the said outstanding claims are not disclosed. If those facts may be such as to sustain actions against the United States under the Tucker Act, that circumstance furnishes no basis for requesting that this Court grant a writ of certiorari in the present case.

6. The case at bar, involving $3,700, and turning upon the factual findings of the Circuit Court of Appeals, is of no such importance as to justify the petitioner's prayer for a writ. *Layne* v. *Western Well Works,* 261 U. S. 387, 392, 393; *Magnum Co.* v. *Coty,* 262 U. S. 159, 163; *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440; *Furness* v. *Yang-Tsze Ins. Ass'n,* 242 U. S. 430; *Tyrrell* v. *District of Columbia,* 243 U. S. 1.

7. The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the decision below in this case should be denied.

Respectfully submitted,

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